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Supreme Court, U.S.
FILED
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CLERK

No. 95-6465

In The

Supreme Court of the United States

October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Transcript of Hearing, February 24, 1994

* * *

[2] THE CLERK: Criminal Cause for Status CR-93-1342 (JMA), United States versus Ray A. Lewis. For the government Jim Walden and Mark Kirsch. For the defense Cynthia Matthews and Jan Roston.

THE COURT: Okay. Do you want to be heard?

MR. WALDEN: Yes, your Honor. Your Honor, there's two things to say in this case. First of all, the aggregation rule, if it applies at all, applies only to incidents where there's a single criminal incident. And every case that's cited, that discusses the aggregation rule, discusses it in the context of a single criminal incident. The most telling case in [sic] the one the defense sites in their latest papers is the Musgrave (Ph) case.

In the Musgrave case in one passage discusses both the theory underlying the aggregation rule and the fact that in this case there was only a single criminal incident. And if your Honor likes, I'll read it. Because modern criminal codes permit multiple charges to flow from single discrete acts of criminality, a criminal prosecution can threaten a defendant with consequences of a series of events. Even though the defendant is not charged with an offense which is deemed a serious offense, I think the papers are clear, and the FMS case further supports that.

The defense counsel has cited in their latest papers that it was affirmed by the Second Circuit. That's not [3] the case. That opinion never went up on appeal, and the Second Circuit case only affirmed the underlying conviction and discussed a separate statutory section.

Second, your Honor, to the extent that you would normally hold that the aggregation rule applies, the government would ask that you rely on Section 18 USC Section 3584, and rule in advance that there will be concurrent sentences here rather than consecutive sentences.

The latest opinion to come out of the Tenth Circuit, the Bencheck (Ph) case, supports this, and in discussing the rational [sic] in the Bencheck case, the Court discusses the other two precedents that defense counsel relies on, that being the Potvin (Ph) case, and the Har (Ph) versus Hanrahan (Ph) case. And it purports to be the latest Tenth Circuit descision [sic] on this issue. In that case, the judge, the trial judge ruled in advance, that under no circumstances would he sentence the defendant to more than six months. And then as a result, the Tenth Circuit said that he wasn't entitled to a jury trial under those facts.

Here, if your Honor wished to rule under Section 3584, the same situation would apply. Under either theory though, your Honor, the defendant would not be entitled to a jury trial in this case, and the government requests a bench trial.

THE COURT: And do you want to address the [4] collateral consequences beyond your papers?

MR. WALDEN: Your Honor, I think my papers speak for themselves in that regard.

THE COURT: Now, Miss Matthews, what about Section 3584?

MS. MATTHEWS: Well –

THE COURT: If I say today I am under no circumstances, there will be no circumstances under which I will sentence Mr. Lewis to more than six months, what's your position? Or your position Miss Roston or, someone's position?

MS. MATTHEWS: I still think that we need a jury trial. The only authority for that is the Bencheck case, and there – I'd have to look at it again. I seem to remember dissenting opinion in the Bencheck case, the reasoning of which I thought was pretty sound. And that is that if the principle – the principles of Baldwin are to – are to be followed, then you can't simply say at the beginning that you're willing to trump the statutory mandated penalty or statutory available penalty. What Baldwin referred to was the statutory penalty that was available at the onset, and you can't simply say I'm only going to enforce that for six months.

THE COURT: But that's what makes it serious, is the threat of a year in prison.

MS. MATTHEWS: But there was – what makes a crime serious is what the people in an acting legislation call serious [5] by specifying penalties.

THE COURT: Except that all the cases that analyze it talk about the fact that you can be sentenced to a year in prison. That seems to be the factor.

MS. MATTHEWS: Right, but that is so because the courts are concerned about what the legislation says by an objective test, what the legislation says, not what the actual term of imprisonment is going to be. I mean, in

any of these cases where you're talking about traditionally petty offenses, rarely are these people ever sent to jail for any period of time. I mean, everyone knows that this is sort of an academic exercise to begin with.

So, if we're talking about what actual sentences that are going to be imposed, then we're not talking about anything that's going to matter. And what these cases talk about is how these crimes are viewed legislatively in terms of the maximum penalties that could be imposed. That makes them serious; not necessarily that any Court is going to say, I'm only going to impose six months or a year or probation, that doesn't really matter. What matters to make it serious is what the legislature has said the seriousness of the crime is as expressed by the maximum penalty that they've written into the statute.

THE COURT: Anything else?

MR. WALDEN: Yes. May I respond, your Honor?

[6] It seems to me, your Honor, that defense counsel is arguing on both sides of the fence here. When they want to get around the possibility of you ordering concurrent sentences, they say that when the Supreme Court talked about the projected indicators in Blantin (Ph), they're talking about the statute. And if the statute applies here, then 18 USC, Section 19 defines these crimes as petty, and nothing in Section 19 says that you aggregate, that would be an exception to Blantin.

But then, when it comes to trying to get around the fact that Blantin says look at the statute, then they say, oh, well, then the objective indicator here is the maximum

penalty that the defendant should be subject to. And then they say you have to aggregate. It doesn't seem like both positions can be simultaneously maintained, your Honor.

THE COURT: That's a good point. Do you want to respond?

MS. MATTHEWS: The point being?

THE COURT: The point being that – when you want to get around me saying that I'm not going to sentence to more than six months, you say you have to look at the statutory language. And when you don't want me to look at the statutory language which defines this as a petty offense, you don't want me to look at that, that part of the statutory language.

MS. MATTHEWS: Which are, but Baldwin – I mean none of those cases have ever looked to the term petty offense [7] to define whether a case – a crime is serious for purposes of triggering the Sixth Amendment right to a jury trial. I mean, the fact that it's called a petty offense by statute, doesn't automatically, you know, vitiate any right to a jury trial. I mean, we're not arguing that at all. I mean, I don't care what the statute calls it. What the cases say is that you have to look to the objective criteria in the statute, and that that is the potential penalty to be imposed. That's what you look to to determine whether it's serious.

The legislature can call it petty or felony or misdemeanor or whatever they want.

THE COURT: But, you have to admit the cases go both ways. It's not so clear that your position is etched in stone in the case law.

MS. MATTHEWS: The position about aggregation or the position –

THE COURT: That this is serious and warrants jury trial.

MS. MATTHEWS: On aggregation grounds?

THE COURT: Yes.

MS. MATTHEWS: I think it's pretty clear. I mean, what –

THE COURT: That you aggregate?

MS. MATTHEWS: That you aggregate the two. If there are two counts in the indictment, that you aggregate the [8] two.

THE COURT: In situations like this, I –

MS. MATTHEWS: I think where they're – particularly like this, whether they're clearly related.

THE COURT: Related why?

MS. MATTHEWS: Related because it's the same course of conduct that they say Mr. Lewis was engaging in. I mean I don't even think, as I said – as we said in the letter, I don't even think you need to get into that analysis. But the government has engaged in it, and I think even –

THE COURT: What incident?

MS. MATTHEWS: Well, the government is pointing out that where they aggregate it really stems from one criminal incident. Isn't that your argument?

MR. WALDEN: It is my argument.

MS. MATTHEWS: But it doesn't in the cases. It doesn't in the cases. I mean there's no case that we have seen that discusses – there's no case that we have seen that says you shouldn't aggregate in this situation because these are distinct criminal acts. Rather, they all analyze the problem as two counts and, therefore, should be aggregated. And in many of those cases, as we pointed out in the letter, it's clear from the facts and from the record, particularly in the FMC case, that they were distinct acts.

I mean that's the case where there were 96 birds, [9] or whatever, that were killed over a period of time, and the government had charged birds in different counts, clearly those birds were killed on different occasions.

MR. WALDEN: May I respond, your Honor?

THE COURT: Uh huh.

MR. WALDEN: Your Honor, the FMS case –

THE COURT: FMC.

MR. WALDEN: Oh, I thought it was FMS, your Honor.

MS. MATTHEWS: It's FMC.

MR. WALDEN: It the FMC case, your Honor, there was one criminal act. They discharged pollutants into a lagoon. The birds, as the Second Circuit opinion clearly states, the counts were based on when the birds were found, not when the pollution was discharged into the lake. And that is a perfect case to show your Honor exactly why the aggregation rule applies where it does.

There was one criminal act, and the government went haywire, and charged 36 counts based on different species of birds that were discovered at different times. Your Honor, I will stipulate in that kind of a situation –

THE COURT: Yes.

MR. WALDEN: That if I were a judge, I would apply the aggregation rule too. But it doesn't apply here, where there were two separate incidents, and if we brought the trial [10] – if we had brought charges on each – on two informations which we were entitled to do, there is no dispute here that this would be a bench trial in each case and that your Honor could sentence him consecutively in both.

MS. MATTHEWS: Wait a second. I mean, I think we do take issue with the way the government – the way the government describes the facts in FMC. It's clear from the Second Circuit opinion that the discharge of the pollutants occurred over, I think it was a three month time – two or three month time period, which means that they charged – whether they picked as the days that they put in the indictment the days the birds were found or not, they're charging separate acts of discharging pollution which killed different birds on different days. It's not any different than Mr. Lewis' case.

THE COURT: Oh, yes it is. Oh, it's very different than Mr. Lewis' case. I mean, it's the same – isn't Potvin the one about the lumber?

MS. ROSTEL: And there are two different discrete acts in that as well, where if someone is first chopping timber, and then building a shelter on property. It

must have taken – it couldn't have taken one day. It must have been over, you know, a period of time.

THE COURT: Well, there were two discrete acts in Potvin. One was actually the trespass on the public land and making a shelter there. They put up tents on public lands.

[11] The second act was the chopping of timber and building a structure on public land. And that again occurred over a time period.

MR. WALDEN: Your Honor, if I could respond. The holding in Potvin directly contradicts that reading of the case. The Court says specifically that there is an aggregation rule where the offenses stem from closely related –

THE COURT: From a single criminal.

MR. WALDEN: Closely related and arose out of the same acts.

MS. MATTHEWS: And there it is. That's exactly what the –

THE COURT: Yeah, but the acts there are really – it's one criminal incident. It's not two separate days of retarding the passage of the mail.

MS. MATTHEWS: It's the same in terms of identity, the same types of acts.

THE COURT: No.

MS. MATTHEWS: I mean we're talking about transaction, criminal transaction.

MS. ROSTEL: It is the same.

THE COURT: You have –

MS. ROSTEL: A person that is instituting, as well as the fact that in –

THE COURT: What are you saying? You aggregate [12] every time you have the same victim?

MS. ROSTEL: No, I'm talking about in terms of figuring out what a transaction is, okay –

THE COURT: This, I don't see how you could ever argue that this case would be a single criminal incident.

MS. ROSTEL: I think there are factors that you should look to such as, and I think that the cases that look to, that define a transaction under Rule 8A, for example, which, first of all, the principle is that you would need to look at a transaction in a broad way. You look at the relationship between the acts.

THE COURT: But there is no way this is a single – I mean I could hear you people make a severance argument too. If you ever wanted to make a severance argument, you'd be arguing the flip side. I mean, if they charged him with retarding the passage of the mail, and then some other mail related offense based on his conduct on one day, then you'd have it; like, I retarded the passage of the mail, then he stole mail and then he did whatever else with those items of mail. Then you'd have a single criminal incident, but not two separate days as I see the information.

MS. ROSTEL: I don't think that sways, based on the fact that they are two separate days, the cases that we cited to you indicating that they have happened on separate days.

[13] THE COURT: It's not even like he went back to the same barrel of mail. I mean, I just don't see how the facts are in your favor under this analysis at all in terms of analyzing it as a single criminal incident.

All right. Anything else?

MR. WALDEN: Nothing from the government, your Honor.

MS. ROSTEL: I think our positions are stated in the –

THE COURT: I mean, you're very interesting. I frankly – it's interesting. I'm going to deny your application. I am going to say and state on the record, that I am not going to sentence Mr. Lewis to more than six months in prison under any circumstances pursuant to 3584. With regard to the collateral consequences argument, I don't believe that the potential collateral consequences here make 1701 a serious offense, and I find Magistrate Dollenger's opinion in the Stocosa (Ph) case exactly on point, and I would adopt his reasoning in denying your application on that basis. So, we'll go tomorrow –

MS. MATTHEWS: What time do we have this?

THE CLERK: It's scheduled for 9:30.

THE COURT: All right.

MR. WALDEN: Thank you, your Honor.

MR. KIRSCH: Thank you, your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Appellee,

-against-

DECISION
93-CR-1342 (CBA)

RAY A. LEWIS,

Defendant-Appellant.

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AMON, U.S. DISTRICT JUDGE

INTRODUCTION

Appellant, Ray Lewis, was convicted on February 25, 1994, after a bench trial before Magistrate Judge Azrack, on two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The appellant challenges his conviction claiming that he was charged with a "serious" offense and was thus constitutionally entitled to a jury trial. For the reasons set forth below, the Court finds that appellant was not entitled to a jury trial and his conviction is hereby affirmed.

BACKGROUND

Appellant was charged in a two-count information with knowingly obstructing the passage of mail in violation of 18 U.S.C. § 1701 on June 3, 1992 and on June 4, 1992. Each count carried a maximum sentence of six months' imprisonment, a fine of one hundred dollars and a ten dollar special assessment.

Over appellant's objection, the government moved that the appellant be tried non-jury. Upon granting the government's motion for a non-jury trial, the Magistrate Judge stated affirmatively that if defendant was convicted on both counts, under no circumstances would she impose a term of imprisonment greater than six months pursuant to 18 U.S.C. § 3584.[1]

Defendant was subsequently convicted of both counts and was sentenced to three years probation on each count, with the sentences to run concurrently. Defendant appeals his conviction claiming that it was error to deny him the constitutional right to a jury trial.

DISCUSSION

In *Baldwin v. New York*, the Supreme Court reaffirmed the long-standing principle that the Sixth Amendment mandates that a defendant charged with a "serious" offense is entitled to a trial by jury, while a defendant charged with a "petty" offense may be tried without a jury. *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)). "In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense . . . and we have found the most relevant such criteria in the severity of the

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[1] 18 U.S.C. § 3584 provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively . . . Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."

maximum authorized penalty." *Id.* at 68 (citations omitted). The Court held that a potential sentence in excess of six months imprisonment is sufficiently severe by itself to render an offense "serious". *Id.* at 69.

In *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538 (1989), the Supreme Court revisited the issue of distinguishing a serious offense from a petty offense for the purpose of determining a defendant's right to a jury trial. After declining to hold that an offense carrying a maximum prison term of six months or less is automatically a "petty" offense, the Court held that such offenses are presumed to be petty for purposes of the Sixth Amendment's right to a jury trial. The Court explained:

> A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line.

Id. at 543.

The parties do not dispute that the conduct prescribed by 18 U.S.C. § 1701 is a "petty" offense; however, appellant claims that he was entitled to a jury trial because he faced an aggregate possible sentence of 12 months imprisonment if convicted on both counts

charged in the information. He argues that the possibility of receiving a sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial. In support of his claim that aggregation of the possible sentences is required when multiple petty offenses are charged in the same instrument, appellant emphasizes the Supreme Court's focus in both *Baldwin* and *Bianton* on an objective assessment of the seriousness of an offense as indicated primarily by the maximum authorized penalty.

The Supreme Court has not specifically addressed the issue of whether or not a defendant facing multiple counts that each carry a maximum sentence of six months or less, but which aggregate to a potential sentence in excess of six months imprisonment, is entitled to a jury trial. The language of the decisions in both *Baldwin* and *Blanton*, however, leads this Court to conclude that it is inappropriate to aggregate the maximum penalties of multiple petty offenses charged in the same instrument for the purpose of determining a defendant's right to a jury trial. In reaching this conclusion, the Court finds the reasoning of Judge Niemeyer in his dissent in *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), persuasive.

The Supreme Court refers to a defendant's right to a jury trial being determined by the "seriousness of the offense". *See Baldwin v. New York*, 399 U.S. at 68; *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. at 542. "The meaningful constitutional object of inquiry is the offense with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging

document." *Coppins*, 953 F.2d at 92 (J. Niemeyer, dissenting). By focusing on the seriousness of the offense charged, rather than the seriousness of defendant's overall conduct, the logical conclusion is that a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged.

The maximum authorized penalty for a given offense is the primary objective factor to be considered in evaluating the seriousness of a particular offense. *Blanton*, 489 U.S. at 541. Recognizing that the legislature is in the best position to determine the severity of an offense, the Supreme Court cautioned that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " Id. at 541-42 (quoting *Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989)). Similarly, the judiciary should not alter the legislature's determination of the seriousness of an offense by concluding without foundation that the legislature intended that commission of two petty offenses would equal a serious offense.

Appellant acknowledges that the government could have properly charged him in two separate criminal informations, each setting forth a single count of obstructing the mail in violation of 18 U.S.C. § 1701, and tried him on each count separately in different bench trials. Appellant concedes that he would not have been entitled to a jury trial under these circumstances even

though if convicted at both trials, he could have received consecutive prison terms, which in total exceeded six months.

Proceeding in this fashion is obviously inefficient and provides the defendant with no greater rights or procedural protections. The Court fails to comprehend how the administrative convenience achieved by trying multiple offenses in a single proceeding alters the seriousness of any of the charged offenses. As Judge Niemeyer so aptly observed, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (dissenting).

In a related context, courts have declined to aggregate penalties to determine the jurisdiction of a magistrate judge. Pursuant to Section 3401(a) of Title 18, a United States Magistrate Judge has the authority to try misdemeanor offenses. Setting forth multiple misdemeanors in a charging instrument with the potential that consecutive sentences in excess of a year may be imposed does not transform these offenses into felonies and deprive the magistrate judge of jurisdiction. *See United States v. Manjarrez-Arce*, 392 F.Supp. 1046 (S.D.Ca.) (defendant charged with three misdemeanor offenses could be tried before a magistrate and upon conviction, sentenced by the magistrate to three consecutive terms of imprisonment of six months each), *aff'd*, 504 F.2d 426 (9th Cir. 1974), *cert. denied*, 419 U.S. 1112 (1975). "It is the grade of the offense, which the Congress has only addressed in terms of the length of the maximum term of imprisonment, which is determinative of the magistrate's statutory jurisdiction." *United States v. Raynor*, 764 F.Supp. 1067,

1070 (D.Md. 1991) (where defendant was convicted before a magistrate on a misdemeanor offense, under 18 U.S.C. § 3401, the magistrate had jurisdiction to revoke defendant's supervised release even though revocation sentence, when added to the original sentence, may result in a term of imprisonment in excess of a year). Similarly, the charging of multiple petty offenses in one instrument does not transform them into a serious offense for the purpose of determining a defendant's right to a jury trial. The jurisdictional and procedural aspects of a case are determined by the nature of each offense charged, rather than the cumulative effect of all of the offenses charged in the information.

This Court has reviewed the opinions which support the appellant's argument for aggregating the maximum penalties of the charged offenses. In *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), the defendant was charged in a single information with one count of trespassing on a military reservation, one count of assault by beating an done count of simple assault after engaging in a fight with military personnel who denied her entrance to the military post. The majority concluded that even though each of the charged offenses was by itself "petty", the defendant was entitled to a jury trial because she faced an aggregate sentence of fifteen months for all three counts. Similarly, in *United States v. Musgrave*, 695 F.Supp. 231 (W.D.Va. 1988), defendants charged with seven petty offenses arising out of an alleged continuous conspiracy to violate the migratory bird and game animal laws were entitled to a jury trial because they faced a possible aggregate sentence for all of the offenses in excess of six months. *See also United States v. O'Connor*, 660 F.Supp. 955

(N.D.Ga. 1987) (defendant charged with two petty offenses, driving under the influence and reckless driving, is entitled to a jury trial because he faced a potential aggregate penalty of one year imprisonment); *United States v. Coleman*, 664 F.Supp. 548 (D.D.C. 1985) (defendants charged with two counts for loitering and congregating around the White House wore entitled to a jury trial where aggregate maximum penalty was one year in prison). These decisions are not binding on this Court. For the reasons discussed previously, the Court does not believe that these opinions are correctly decided and declines to follow them.

In reaching this result, the Court notes that it does not accept as relevant the distinction the government seeks to draw between the facts of this case and the facts of the cases relied upon by the appellant. The government notes that where courts have aggregated the penalties, the multiple petty offenses arose out of a single criminal incident; whereas, here the appellant is charged with two petty offenses, each arising from a separate criminal act. On this basis, the government maintains that there is no authority to support the aggregation of penalties of multiple petty offenses for the purpose of determining a defendant's right to a jury trial where the offenses stem from multiple criminal incidents.

Inherent in the government's argument is the notion that multiple petty offenses are somehow more serious when they arise from a single criminal act than when they stem from multiple criminal incidents. The Court finds this distinction to be unconvincing. In fact, if one were to distinguish at all between multiple offenses arising from a single incident and those arising from multiple

incidents, it is the latter category that would often be considered more "serious". Separate and repeated incidents of criminal behavior would appear more serious and pose a greater likelihood that the defendant would be sentenced to consecutive terms of imprisonment than charges arising from one criminal episode. It is therefore not logical to distinguish between these two situations for the purpose of deciding whether or not to aggregate the maximum penalties of multiple petty offenses that are charged in the same document.[2]

The Court holds that a defendant charged with multiple offenses is entitled to a jury trial under he Sixth Amendment only if any one of the offenses carries a maximum sentence greater than six months.[3] Multiple petty offenses charged and tried together do not entitle a defendant to a trial by jury even if the defendant faces a potential aggregate sentence in excess of six months.

Appellant further argues that even if the Court determines that aggregation of the maximum potential sentences for each petty offense is not appropriate, he was entitled to a jury trial because he faced the possibility of an additional statutory penalty that rendered the offense "serious". Pursuant to 18 U.S.C. § 3563(b)(6), the Court

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[2] Appellant's argument that the offenses charged in the information actually constituted a single criminal incident or course of conduct, therefore need not be addressed.

[3] Given this holding, the Court does not reach the issue of whether the Magistrate's pre-trial guarantee that if convicted on both counts, defendant would not be sentenced to a term of imprisonment greater than six months, operated to eliminate any claim by the defendant that he is entitled to a jury trial.

had the authority to order appellant to give up his job as a postal worker as a condition of a sentence of probation. Prior to trial, Magistrate Judge Azrack concluded that this potential additional statutory penalty did not render the charged offense "serious".[4] The Court agrees with the Magistrate's conclusion that the additional economic penalty appellant possibly faced is not sufficient to transform the petty offense of 28 U.S.C. § 1701 into a "serious" offense for purposes of determining the jury trial right.

In *Blanton*, the Supreme Court expanded the consideration of objective indications of the seriousness of an offense to include "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration". *Banton*, 489 U.S. at 543. The Court cautioned, however, that it would be the "rare" occasion that the legislature would impose additional statutory penalties that were sufficient to render an otherwise petty offense, serious. *Id.*

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[4] In reaching this conclusion, Magistrate Azrack found *United States v. Stoklasa*, 1992 WL 77550 (S.D.N.Y. 1992) (denying defendant's application for a jury trial finding that 18 U.S.C. § 1701 was a "petty" offense because it provided for a maximum sentence of six months' imprisonment and a $5,000 fine) to be directly on point. The court in *Stoklasa* rejected defendant's argument that the potential collateral consequences of losing his job as a postal worker transformed the offense from petty to serious stating that such consequences "flow not from any criminal penalty mandated by Congress, but from the policies adopted by the United States Postal Service." *Stoklasa*, at *2. Although *Stoklasa* appears to reach the appropriate conclusion, that is U.S.C. § 1701 is a "petty" offense for the purpose of determining a defendant's right to a jury trial, the court never considered the implication of 18 U.S.C. § 3563(b)(6) in this determination and therefore cannot be considered controlling.

Most recently, the Supreme Court has held that driving under the influence of alcohol in a national park, with a maximum penalty of six months' imprisonment and a fine of $5,000, was a petty offense for the purpose of determining defendant's right to a jury trial even though the defendant faced an alternative sentence of five years probation. *United States v. Nachtigal*, 113 S.Ct. 1072 (1993). The Court concluded:

> Nor do we believe that the parole alternative renders the DUI offense 'serious.' Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.

Id. at 1074.[5] The Court's emphasis on the fundamental difference between a sentence of incarceration and a sentence of probation undermines appellant's argument that the potential penalty of losing his job as a condition of probation is sufficient to render the charged offense "serious".

The only case appellant cites where a court round that the additional statutory penalties rendered the

[5] The Court specifically referenced the discretionary conditions that may be imposed pursuant to 18 U.S.C. § 3563(b). *Nachtigal*, 113 S.Ct. at 1074, fn.*. However, the defendant in *Nachtigal* was not subject to the particular condition at issue here, § 3563(b)(6).

charged petty offense, "serious", is *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). In that case, the Eighth Circuit found that a mandatory fifteen year license revocation, in addition to a maximum prison term of six months, rendered a third offense DWI "serious", thereby affording defendant the right to a jury trial. The holding in *Richter* is consistent with the language of *Nachtigal* and *Blanton* which indicates that it is statutory penalties that may be imposed in addition to a period of incarceration that potentially afford a defendant the right to a jury trial for an otherwise petty offense. *See Nachigal*, 113 S.Ct. at 1073; *Blanton*, 489 U.S. at 543. Here, the authority of the Court pursuant to § 3563(b)(6) to order the defendant to relinquish his job at the Post Office is only as a condition of probation. There is no authority for the Court to mandate his dismissal together with a term of imprisonment. Accordingly, the potential for job loss does not render the offense serious.

CONCLUSION

The Magistrate Judge did not err in refusing to grant appellant a jury trial. Where a defendant is charged with multiple petty offenses in a single document, the potential maximum sentences for the offenses should not be aggregated for the purpose of determining whether the individual is entitled to a jury trial. Furthermore, the possibility of appellant being required to relinquish his job as a postal employee as a condition of a sentence of probation was not sufficient to render the charged

offenses "serious". Therefore, appellant was not entitled to a jury trial and his conviction is hereby affirmed.

Dated: Brooklyn, New York
December 7, 1994

/s/ Carol Bagley Amon
Carol Bagley Amon
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1698 – August Term, 1994

(Argued: June 20, 1995 Decided: September 5, 1995)

Docket No. 94-1701

UNITED STATES OF AMERICA,

Appellee,

-v.-

RAY A. LEWIS,

Defendant-Appellant.

Before:

KEARSE, ALTIMARI and PARKER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting defendant-appellant Ray Lewis, following a bench trial, of two counts of obstructing the mails, in violation of 18 U.S.C. § 1701.

Affirmed.

ALTIMARI, *Circuit Judge:*

Defendant-appellant Ray Lewis ("Lewis") appeals from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting him, following a bench trial, of two counts of obstructing

the mails. Lewis contends that he was improperly denied a jury trial in light of the fact that the maximum potential aggregate sentence for his two charges exceeded six months. The district court, however, held that, for the purpose of determining a defendant's right to a jury trial, penalties should not be aggregated. Because Congress has given no indication that multiple offenses are more serious by virtue of their multiplicity than are single offenses of the same nature, the right to a jury trial cannot depend upon the maximum potential aggregate term of incarceration. Accordingly, we affirm the judgment of the district court.

BACKGROUND

Lewis, a postal worker, was charged with two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The maximum sentence for each count was six months' imprisonment, a hundred dollar fine and a ten dollar special assessment. Prior to trial, the government moved to have Lewis tried without a jury. Magistrate Judge Azrack granted the government's motion, but stated that she would not "sentence Mr. Lewis to more than six months in prison under any circumstances. . . . " On February 25, 1994, Lewis was convicted of both counts and sentenced to three years of probation on each count to run concurrently.

Lewis appealed the denial of a jury trial to the district court, which on December 7, 1994 affirmed Magistrate Judge Azrack's determination. The district court held that the right to a jury trial was not determined by the severity of the sentences for the offenses in their

aggregate, but rather by the severity of the sentences for each charge individually. Thus, according to the district court, "a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged."

Lewis now appeals the determination of the district court.

DISCUSSION

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . " U.S. Const. amend. VI. Despite the absolute language of the Sixth Amendment, the Supreme Court has made clear that a jury trial is required for only those offenses that are "serious" in nature; bench trials are sufficient for "petty" offenses. *See Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968).

In order to determine whether or not an offense is "serious," the Supreme Court has looked to "objective criteria." *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion). According to the Court, the best objective indicator of the seriousness of an offense is "the severity of the maximum authorized penalty." *Id.* Implicit in the maximum penalty is Congress's view as to the seriousness of that crime. *See Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989); *Frank v. United States*, 395 U.S. 147, 148 (1969). The legislature is better equipped than is the judiciary to measure public sentiment as to the seriousness of respective offenses and is more responsive to changes in the public attitude. *See Blanton*, 489 U.S. at

541-42; *see also Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989). Thus, the maximum authorized penalty for a particular offense is a strong indicator of the present sentiment as to the seriousness of that crime.

While courts are instructed to look at all potential modes of punishment for a particular offense (e.g. incarceration, probation, fines, etc.), "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration." *Blanton*, 489 U.S. at 542. Regardless of any other possible punishment, the Supreme Court has determined that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69. Accordingly, any defendant facing in excess of six months incarceration for a single offense is entitled to a jury trial.

The question which remains unanswered by the Supreme Court, however, is whether an individual potentially facing over six months imprisonment for multiple petty offenses is entitled to a jury trial. Those courts which have addressed this question to date are in agreement that potential sentences must be aggregated to determine the right to a jury trial. *See United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991); *United States v. Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991); *Rife v. Godbehere*, 814 F.2d 563, 565 (9th Cir. 1987); *see also United States v. Musgrave*, 695 F. Supp. 231, 233 (W.D. Va. 1988); *United States v. O'Connor*, 660 F. Supp. 955, 956 (N.D. Ga. 1987); *United States v. Coleman*, 664 F. Supp. 548, 549 (D.D.C. 1985); *United States v. FMC Corp.*, 428 F. Supp. 615, 620 (W.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d

902 (2d Cir. 1978). These courts reason, in essence, that "defendants can view as no less serious a possible penalty of [over six months] in prison when charged with [multiple] offenses . . . than if charged with one offense having a potential penalty of [greater than six months]. . . . Nor . . . should [a] court view the offenses any less seriously." *Coppins*, 953 F.2d at 90 (quoting *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973)).

We reject the reasoning of these courts. When determining a defendant's rights under the Sixth Amendment, the mere possibility of consecutive sentences exceeding six months' imprisonment is insufficient to trigger a defendant's right to a jury trial. We believe that in reaching the opposite conclusion, the courts discussed above failed to focus on the appropriate objective criteria for determining the seriousness of multiple offenses tried together. The Supreme Court has made clear that courts should look to Congress's determination as to the seriousness of a particular offense. Indeed, the Court has explicitly stated that "[t]he judiciary should not substitute its judgment as to seriousness for that of [the] legislature. . . . " *Blanton*, 489 U.S. at 541. While those courts that have previously addressed the question have focused upon the *defendant's* view as to the seriousness of facing over six months imprisonment for aggregate sentences, the appropriate inquiry is how seriously *Congress* views the offenses in the aggregate.

Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense. Rather, 18 U.S.C. § 3584(a) provides that, except as mandated by court order or statute,

"[m]ultiple terms of imprisonment imposed at the same time run concurrently." Thus, the presumption under § 3584(a) is that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction.

Moreover, the question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations. While trying Lewis's two offenses separately would have been contrary to judicial economy – an outcome we seek to avoid when possible – Lewis himself admits that under such a circumstance he would not have been entitled to a jury trial. Under § 3584, had Lewis been convicted in separate bench trials, the district court could have sentenced him to two terms of imprisonment to run consecutively, thus still exposing him to as much as a year of imprisonment. The mere fact that the government chose to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately. As Judge Niemeyer wrote in his dissenting opinion in *Coppins*, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (Niemeyer, *J.*, dissenting). We agree.

In addressing the question of aggregate penalties, the Fourth Circuit has held that the Supreme Court's pronouncement in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), is determinative of the issue:

> [T]here is no apparent reason why the Court's holding in *Codispoti v. Pennsylvania* that consecutive sentences of imprisonment actually imposed for a series of contempts committed during a single trial should be aggregated for this purpose should not apply also to require aggregation of any maximum sentences authorized by statute where those are determinative of the right.

Coppins, 953 F.2d at 90 (citation omitted). In *Codispoti*, however, the Supreme Court addressed the question of aggregating penalties in the context of contempt charges, which in our view does not bear directly upon the issue at hand.

"In criminal contempt prosecutions, 'where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.' " *Blanton*, 489 U.S. at 542 n.6 (quoting *Frank*, 395 U.S. at 149.) Accordingly, the only measure of the seriousness of a particular contemnor's criminal acts is the entirety of the court's sentence – the aggregate of the penalties imposed for each contemptuous act – a matter which is strictly at the court's discretion, *see, e.g., United States v. Local 1804-1, Int'l Longshoremen's Assoc., AFL-CIO*, 44 F.3d 1091, 1095-96 (2d Cir. 1995) (describing limits of court's discretion). Because courts cannot look to Congress's estimation of seriousness in the contempt context, the fact that the Supreme Court mandated aggregation of multiple contempt penalties to determine the sentence actually imposed has no bearing on the issue at hand. While *Codispoti* controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime – then, as now,

aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial.

Finally, the government argues that even if the court were to aggregate potential sentences, Lewis was not entitled to a jury trial because the magistrate judge assured Lewis that the trial would result in no greater sentence than six months' imprisonment. While we need not resolve this question, in light of the discussion above it is clear that the government's argument is unavailing. The measure for constitutionally required jury trials is the "seriousness" of any given offense or offenses, which is, in turn, measured principally by the maximum punishment authorized by Congress; therefore, self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial. *But see Bencheck*, 926 F.2d at 1519 ("where the trial judge announced that the sentence, in the event of conviction, would be no more than six months' incarceration . . . no jury was constitutionally required").

CONCLUSION

Because we do not believe that Congress has indicated that petty offenses are more serious in their aggregate than is each petty offense unto itself, we affirm the judgment of the district court.

SUPREME COURT OF THE UNITED STATES

No. 95-6465

Ray A. Lewis,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pre-trial commitment that the aggregate sentence imposed will not exceed six months?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

January 19, 1996